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## Pushing the Envelope: Why Washington, DC Airspace Restrictions Do Not Enhance Security

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**PUSHING THE ENVELOPE: WHY WASHINGTON, DC  
AIRSPACE RESTRICTIONS DO NOT  
ENHANCE SECURITY**

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## I. INTRODUCTION

If the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify.<sup>1</sup>

"As for our common defense, we reject as false the choice between our safety and our ideals."<sup>2</sup>

**T**WO DAYS AFTER the September 2001 terrorist attacks on the United States, the cover of the *Economist* stated simply "The Day the World Changed."<sup>3</sup> Nowhere has this been more true than in the aviation industry where, driven by a new culture of fear, Americans now quietly accept restrictions that, less than a decade ago, were unthinkable. This new regulatory environment goes beyond allocating a few extra minutes to pass through the security gate at a local airport. Along with excessive passenger screening and outdated and often incorrect "watch lists," pilots, mechanics, and air traffic controllers are now subjected to intense scrutiny and constant second-guessing by security personnel with far less experience and training. Pilots face severe punishment for the slightest deviation into an arbitrary airspace boundary over the metropolitan Washington, D.C. area even when no flight safety has been compromised.<sup>4</sup> These ill-conceived restrictions are estimated to have cost over \$300 million in lost revenue from small airports in the region.<sup>5</sup> Addi-

<sup>1</sup> The Federalist No. 33 (Alexander Hamilton).

<sup>2</sup> President Barack H. Obama, Inaugural Address (Jan. 20, 2009).

<sup>3</sup> *The Day the World Changed*, *ECONOMIST*, Sep. 13, 2001, at 13.

<sup>4</sup> Washington, DC Metropolitan Area Special Flight Rules Area, 70 Fed. Reg. 45,250 (Aug. 4, 2005) [hereinafter NPRM].

<sup>5</sup> *Id.*

tionally, understaffed and overworked air traffic controllers are forced to cope with a system that has punished thousands of aviators but has not stopped a single terror attack.

Evidence suggests that while these restrictions have made little difference with respect to safety, they have advanced the financial decline of the aviation industry.<sup>6</sup> Attempts to reform aspects of the current system have been stalled due to poor implementation or political maneuvering. Maintaining the status quo will only strain the aviation system further—500 million additional passengers and hundreds of smaller airplanes, manned and unmanned, are forecast to take to the airways by 2010.<sup>7</sup> While it is impossible to guarantee terror-free skies, strengthened security rules, both published and unpublished, will serve only to deprive Americans of their right to traverse the airspace over the United States.

This paper examines the federal government's authority to impose such restrictions, evaluates the wisdom of current governmental oversight, and concludes that the aviation industry is poorly secured by the current airspace regulatory system. Part II provides the historical context underlying the creation of the Transportation Security Administration (TSA) and provides the framework for its regulatory policies. Part III examines several of these policies and regulations, focusing on the implementation of the Air Defense Identification Zone (ADIZ) and recently-codified Special Flight Rules Area (SFRA) over the Washington, D.C. area and evaluating both the direct and indirect consequences to those affected by the SFRA. Part IV looks at the legality of the TSA's actions through several aspects of agency regulation, focusing on the authority of an agency to regulate airspace while balancing national security with individual freedom. Part V concludes by offering several alternatives to the current system that provide for national security without unduly depriving American pilots and support staff of their liberty.

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<sup>6</sup> Comment from Phil Boyer, President, Aircraft Owners and Pilots Ass'n, to Ellen Crum, U.S. Dep't of Transp. (Nov. 2, 2005), *available at* <http://www.aopa.org/whatsnew/newsitems/2005/051102aopa-comments.pdf> [hereinafter AOPA Comment]. The AOPA is a not-for-profit organization that has advocated the interests of general aviation pilots and aircraft owners since 1939.

<sup>7</sup> *Fear of Flying: A Special Report on Air Travel*, ECONOMIST, June 16, 2007, at 4.

## II. CLEARED FOR TAKEOFF: TSA'S LEGISLATIVE MANDATE AND SCOPE OF AUTHORITY

### A. A HISTORICAL OVERVIEW OF FLIGHT AND REGULATION

In 1908, Army Signal Corps Lieutenant Thomas Selfridge became the first person to perish in an aircraft accident while evaluating Orville Wright's new flying machine.<sup>8</sup> This tragic incident demonstrated the need to secure the safety of persons both in the air and on the ground, and the great numbers of accidents during the barnstorming era of the 1920s led to the belief that industry regulation was needed.<sup>9</sup> At the urging of aviation leaders, President Coolidge signed the Air Commerce Act, which transferred aircraft security from the private sector to the newly-formed Aeronautics Branch of the Department of Commerce.<sup>10</sup> In addition to new security regulations, the Aeronautics Branch directed licensing of aircraft and pilots, the creation of a commercial airway system, construction of navigational aids, and mandatory accident investigations.<sup>11</sup> When the role of the Aeronautics Branch expanded, the Commerce Department renamed it the Bureau of Air Commerce in 1934.<sup>12</sup>

The new Bureau proved to be short-lived. Four years later, Congress passed the Civil Aeronautics Act and created a new agency, the Civil Aeronautics Authority.<sup>13</sup> The agency was subdivided into two separate departments, one of which, the Civil Aeronautics Board (CAB), carried out safety programs, rulemaking, and accident investigation.<sup>14</sup> Although formed as part of the Department of Commerce, the CAB functioned independent of the Secretary, which is similar to modern-day safety programs.<sup>15</sup>

The new era of jet travel brought with it a series of mid-air collisions, prompting legislation to create an independent

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<sup>8</sup> *Airship Falls, Lt. Selfridge Killed, Wright Hurt*, WASH. POST, Sept. 18, 1908.

<sup>9</sup> David H. Onkst, *Barnstormers*, U.S. Centennial of Flight Comm'n, [http://www.centennialofflight.gov/essay/Explorers\\_Record\\_Setters\\_and\\_Daredevils/barnstormers/EX12.htm](http://www.centennialofflight.gov/essay/Explorers_Record_Setters_and_Daredevils/barnstormers/EX12.htm) (last visited May 24, 2009).

<sup>10</sup> Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568 (1926).

<sup>11</sup> A Brief History of the Federal Aviation Administration, [http://www.faa.gov/about/history/brief\\_history](http://www.faa.gov/about/history/brief_history) (last visited May 24, 2009) [hereinafter *Brief History*].

<sup>12</sup> Air Commerce Act.

<sup>13</sup> Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973 (1938).

<sup>14</sup> *Brief History*, *supra* note 11.

<sup>15</sup> *Id.*

agency designed to improve airline safety, among other things.<sup>16</sup> Through the Federal Aviation Act, Congress established the Federal Aviation Administration (FAA).<sup>17</sup> The Federal Aviation Act gave the FAA the authority to ensure passenger safety and to protect property, and the first FAA Administrator launched a vigorous airline safety campaign.<sup>18</sup> While the emphasis on passenger safety was laudable, a surge in aircraft hijackings in the late 1960s<sup>19</sup> required the FAA to go beyond the Aviation Act's mandate and face the problems of aviation security and aircraft piracy head on.<sup>20</sup>

Congress later strengthened the FAA's authority to secure air travel by passing the Anti-Hijacking Act.<sup>21</sup> This Act imposed penalties for skyjackers, gave the President the ability to suspend air service to the United States from any foreign carrier that fails to maintain minimum security levels, and provided the FAA the authority to screen passengers as well as train airport security personnel.<sup>22</sup> However, to implement these new protocols, the FAA contracted security screening to private companies, and generally awarded these contracts to the lowest bidder.<sup>23</sup> This system, driven by a governmental mandate requiring airlines to take charge of security measures, led to screeners that were not only poorly trained but were, at times, convicted felons.<sup>24</sup>

The government addressed this untenable situation after the 1988 Pan Am flight 103 disaster<sup>25</sup> by passing the Aviation Security Improvement Act.<sup>26</sup> Motivated by a Presidential Commission on Aviation Security that released a 182-page report calling U.S.

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<sup>16</sup> *Id.*

<sup>17</sup> Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (codified as amended at 49 U.S.C. § 40101 (2000)).

<sup>18</sup> Brief History, *supra* note 11.

<sup>19</sup> Paul Stephen Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 COLUM. J. TRANSNAT'L L. 649, 653 (2003). Professor Dempsey notes that in 1968 there were thirty successful hijackings, seventeen of which had U.S. registration. *Id.* In 1969 there were eighty-two, more than in all previous years combined. *Id.*

<sup>20</sup> Brief History, *supra* note 11.

<sup>21</sup> Antihijacking Act of 1974, Pub. L. No. 93-366, 88 Stat. 409 (1974).

<sup>22</sup> Dempsey, *supra* note 19, at 699.

<sup>23</sup> Paul R. Verkuil, *Symposium: Terrorism, Globalization and the Rule of Law: The Publicization of Airport Security*, 27 CARDOZO L. REV. 2243, 2244 (2006).

<sup>24</sup> *Id.*

<sup>25</sup> Dempsey, *supra* note 19, at 707.

<sup>26</sup> Aviation Security Improvement Act of 1990, Pub. L. No. 101-604, 104 Stat. 3066 (codified as amended in scattered sections of 22 U.S.C., 26 U.S.C., 49 U.S.C. (2000)).

aviation security seriously flawed,<sup>27</sup> the Act provided the FAA authority over airport screeners, established leadership positions within the FAA to oversee security, and mandated research projects to improve screening technology.<sup>28</sup> It also noted the Commission's concerns about the "lack of coordination and communication between the State Department, the FAA, and the American intelligence gathering community."<sup>29</sup>

Although these changes were welcome, after the 1996 TWA flight 800 accident,<sup>30</sup> another commission chaired by then Vice President Al Gore recommended further changes, including the increased use of passenger profiling, passenger inspections, and canines and other technology to detect explosives.<sup>31</sup> These recommendations led to the Federal Aviation Reauthorization Act, which implemented many of the Gore Commission's recommendations and further strengthened the FAA's security role.<sup>32</sup> However, in a later report, the FAA admitted that there was no consensus on who should fund aviation security and left responsibility for security screening to the air carriers themselves.<sup>33</sup> This decision made the U.S. one of only three countries (in addition to Canada and Bermuda) that left security to the private sector—in every other nation in the world airport security was deemed a state function which was usually left to law enforcement.<sup>34</sup>

## B. THE AVIATION AND TRANSPORTATION SECURITY ACT OF 2001

Despite these regulatory efforts, airport and airway security remained relatively porous, allowing nineteen hijackers to commandeer four commercial airliners in 2001 with disastrous results.<sup>35</sup> The public demanded the government take a more active role in aviation security, and in response to this demand,

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<sup>27</sup> Exec. Order No. 12,686, 54 Fed. Reg. 32,629 (Aug. 9, 1989).

<sup>28</sup> 49 U.S.C. §§ 44931–44932 (2000).

<sup>29</sup> *Findings and Recommendations of the Commission on Aviation Security and Terrorism*, 101st Cong. S6720 (May 15, 1990) (statement of Sen. Lautenberg).

<sup>30</sup> U.S. GEN. ACCOUNTING OFFICE, AVIATION SECURITY: FAA'S ACTIONS TO STUDY RESPONSIBILITIES AND FUNDING FOR AIRPORT SECURITY AND TO CERTIFY SCREENING COMPANIES, RCED-99-53 at 1 (1999).

<sup>31</sup> White House Commission on Aviation Safety and Security, Final Report to President Clinton (1997).

<sup>32</sup> Federal Aviation Reauthorization Act, Pub. L. No. 104-264, 110 Stat. 3213 (1996).

<sup>33</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 30.

<sup>34</sup> Dempsey, *supra* note 19, at 721.

<sup>35</sup> *Id.* at 721.

on November 19, 2001, Congress passed the Aviation and Transportation Security Act (ATSA).<sup>36</sup> The ATSA changed many features of the aviation security landscape—it federalized airport security functions, mandated background checks on airport employees, and required impenetrable cockpit doors.<sup>37</sup> Noting that the FAA historically had been slow to implement its wishes, Congress created perhaps the ATSA's most enduring legacy—the Transportation Security Administration (TSA).<sup>38</sup> The TSA assumed the responsibility for aviation security from the FAA and shifted the focus from an emphasis on aircraft accidents to identifying infrastructure weaknesses that could be used by terrorists.<sup>39</sup> To accomplish this task, Congress authorized the TSA to gather intelligence, assess threats, and consult with other governmental agencies as required to accomplish its mission.<sup>40</sup> Further, in the event of a national emergency, the TSA is permitted to take control of all modes of transportation—presumably shutting down the entire transportation network if necessary.<sup>41</sup>

Since its creation, the TSA has implemented several far-reaching policies seemingly within the scope of its mandate. The TSA has promulgated regulations requiring an Airport Security Coordinator and the establishment of an Airport Security Program at each commercial airport,<sup>42</sup> specific procedural safeguards throughout the airport,<sup>43</sup> and criminal history checks and mandatory identification systems for employees.<sup>44</sup> Additionally, the TSA exercises considerable control over smaller, non-commercial airports and flight schools, mandating annual employee security awareness training to recognize suspicious activities of flight school applicants or participants.<sup>45</sup> TSA's Alien Flight Student Program requires extensive background checks and threat assessments for non-U.S. citizens seeking flight training.<sup>46</sup>

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<sup>36</sup> Aviation and Transportation Security Act, Pub. L. 107-71, 115 Stat. 597 (codified in scattered sections of 5 U.S.C., 26 U.S.C., 31 U.S.C. (2006); 42 U.S.C., 49 U.S.C. (2000 & Supp. IV 2005)).

<sup>37</sup> Dempsey, *supra* note 19, at 714.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> 49 U.S.C. § 114(f) (2000 & Supp. IV 2005).

<sup>41</sup> Dempsey, *supra* note 19, at 715.

<sup>42</sup> Airport Security, 49 C.F.R. § 1542.3, §§ 1542.101–113 (2002).

<sup>43</sup> §§ 1542.201–205.

<sup>44</sup> §§ 1542.209–211.

<sup>45</sup> Flight Schools, 49 C.F.R. § 1552.23 (2004).

<sup>46</sup> Transportation Security Administration, Alien Flight Student Program, [http://tsa.gov/what-we\\_do/layers/afsp/editorial\\_multi\\_image\\_with\\_table\\_0215](http://tsa.gov/what-we_do/layers/afsp/editorial_multi_image_with_table_0215).



In 2002, Congress passed the Homeland Security Act and transferred the TSA from the Department of Transportation to the newly-minted Department of Homeland Security (DHS).<sup>47</sup> In forming the DHS, Congress created a unified agency designed to prevent future domestic terrorist attacks<sup>48</sup> by absorbing twenty-two existing agencies comprised of 170,000 employees and a combined budget of forty billion dollars.<sup>49</sup> Among those agencies assimilated into the DHS were several tasked with airport and airline passenger safety and security, including the Customs Service, Immigration and Naturalization Service, the Animal and Plant Inspection Service of the Department of Agriculture, and the TSA.<sup>50</sup>

### III. HOSTILE AIRCRAFT AHEAD: THE FAA AND TSA CREATE THE FLIGHT RESTRICTED ZONE AND AIR DEFENSE IDENTIFICATION ZONE

#### A. THE FAA AND TSA TAKE CHARGE

The FAA has broad power to regulate the airspace over the United States.<sup>51</sup> Although Congress recognizes the right of each citizen to transit through navigable airspace,<sup>52</sup> Congress tempers this right by a need to protect and identify aircraft, prevent aircraft collisions, and ensure the safety of persons and property on the ground.<sup>53</sup> To ensure effective airspace control, the FAA has the authority “to establish security provisions that will encourage and allow maximum use of the navigable airspace by civil aircraft consistent with national security . . . .”<sup>54</sup> As a result, the FAA has long-standing authority to create temporary airspace restrictions to respond to rapidly changing air and ground-based security concerns. These limitations often take the form of Temporary Flight Restrictions (TFRs) that will temporarily close the airspace above a place or event that might be vulnerable to an airborne attack, such as the State of the Union address or the

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shtm (last visited May 24, 2009). Non-U.S. citizens must provide the TSA with biographical information, fingerprints, and training specifics. *Id.*

<sup>47</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

<sup>48</sup> 6 U.S.C. § 101 (2006).

<sup>49</sup> Mimi Hall, *Deal Set on Homeland Department*, USA TODAY, Nov 13, 2002, at 1A.

<sup>50</sup> 6 U.S.C. § 203 (2006).

<sup>51</sup> See 49 U.S.C. §§ 106(g), 40103(b) (2000).

<sup>52</sup> § 40103(a).

<sup>53</sup> § 40103(b)(2).

<sup>54</sup> § 40103(b)(3).

Super Bowl.<sup>55</sup> These TFRs are ordinarily coordinated with the Department of Defense and, in the event of an airspace incursion, a military fighter or helicopter may be launched to intercept and divert the offending aircraft.<sup>56</sup> Pilots receive notification of a TFR through a Notice to Airman (NOTAM), which are provided when the pilot receives their required pre-flight briefing.<sup>57</sup>

The TSA likewise has significant authority to ensure the safety of civil aviation. The TSA is charged with developing “policies, strategies, and plans for dealing with threats to transportation security,” as well as coordinating countermeasures to prevent attacks with the appropriate departments and agencies of the U.S. government.<sup>58</sup> Although the FAA retains authority over airspace security, the TSA is permitted to work with the FAA with respect to any actions or activities that might affect aviation safety.<sup>59</sup> While the roles of each agency may overlap, it is generally viewed as the TSA’s responsibility to ensure the ground safety of passengers and property in and around the airport itself, while the FAA retains control over security from takeoff to landing.

Within hours after the first attacks on September 11, 2001, the FAA closed the National Airspace System (NAS), and when the NAS was re-opened on September 13, a series of temporary but severe restrictions remained. These restrictions included a complete prohibition on all aircraft operations at civil airports within a twenty-five nautical mile radius of Washington National Airport (DCA)<sup>60</sup> and a NOTAM authorizing instrument-only and limited visual flights outside the twenty-five mile radius.<sup>61</sup> These restrictions stopped virtually all general aviation flights at six smaller, regional airports until December 19, when the FAA issued a second NOTAM decreasing the size of the restricted airspace.<sup>62</sup> Although reducing the restricted airspace meant

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<sup>55</sup> 14 C.F.R. § 91.145 (2006).

<sup>56</sup> Michael W. Brown, *TFR—Airspace Obstacles and TFR Trivia: A Pilot’s Guide to Understanding Restrictions in Today’s National Airspace System*, FAA AVIATION NEWS, November/December 2003, 1, available at [http://www.faa.gov/pilots/safety/notams\\_tfr/media/tfrwed.pdf](http://www.faa.gov/pilots/safety/notams_tfr/media/tfrwed.pdf).

<sup>57</sup> 14 C.F.R. § 91.103 (2006).

<sup>58</sup> 49 U.S.C. § 114(f)(3)–(4) (2000 & Supp. 1 2002).

<sup>59</sup> § 114(f)(13).

<sup>60</sup> Emergency air traffic rules issued pursuant to 14 C.F.R. § 91.139 (2008) and temporary flight restrictions (TFRs) issued pursuant to 14 C.F.R. § 91.137 (2008).

<sup>61</sup> Enhanced Security Procedures for Operation at Certain Airports in Washington, DC Metropolitan Area, 68 Fed. Reg. 7684 (Feb. 14, 2003).

<sup>62</sup> *Id.*

three of these airports could resume limited operations, the three airports closest to downtown, College Park Airport (CGS), Potomac Airpark (VKX), and Hyde Field (W32), remained closed. These airports, known collectively as the "Maryland Three," were shut down until February 12, 2002, when the FAA issued Special Federal Aviation Regulation 94 (SFAR 94) governing all operating requirements to take off and land at these airports.<sup>63</sup> SFAR 94 mandated all pilots and flight crews operating from the Maryland Three undergo a background check, attend an FAA briefing regarding airport security procedures, maintain no more than one airspace violation on record, and receive a personal identification number before a flight plan is filed.<sup>64</sup> Because the government formed the TSA in response to the post-9/11 environment, the FAA retained control over all security policies and procedures until mid-2002, when the TSA incorporated the provisions of SFAR 94 into its regulatory scheme. Although SFAR 94 expired on February 13, 2005, the TSA incorporated the same security measures into its regulations, so they remain in effect.<sup>65</sup>

B. CARELESS AND RECKLESS: THE DC SPECIAL FLIGHT RULES  
AREA AND FLIGHT RESTRICTED ZONE ARE  
CREATED AND CODIFIED

The FAA imposes severe restrictions on all flights above the DC metropolitan area. On February 10, 2003, the FAA formalized these restrictions with the creation of two new airspace regions. The first, an Air Defense Identification Zone (ADIZ), surrounded not only metropolitan DC but extended to northern Baltimore and west of Dulles airport.<sup>66</sup> The FAA changed the ADIZ on August 30, 2007, to a thirty-mile ring centered on Reagan National Airport.<sup>67</sup> The FAA also established a smaller, more strictly controlled portion of airspace with an approximately fifteen nautical mile radius from Reagan National Airport called the Flight Restricted Zone (FRZ).<sup>68</sup> The ADIZ

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<sup>63</sup> 14 C.F.R. § 91 (2005).

<sup>64</sup> *Id.*

<sup>65</sup> NPRM, *supra* note 4, at 42,252.

<sup>66</sup> Helicopter Assoc. Int'l, FAA Issues NOTAM Modifying, Washington, D.C. ADIZ, <http://www.rotor.com/default.aspx?tabid=510&newsid905=48897> (last visited May 24, 2009).

<sup>67</sup> KZDC NOTAM 7/0206 Flight Restrictions Washington, D.C., (Sept. 10, 2008), *available at* [www.faa.gov](http://www.faa.gov).

<sup>68</sup> KZDC NOTAM 7/0211 Flight Restricts Washington, D.C., (Sept. 10, 2008), *available at* [www.faa.gov](http://www.faa.gov).

effectively acted as a buffer to alert ground personnel that an FRZ incursion is possible—essentially, the ADIZ was established to keep aircraft outside the FRZ and away from the government buildings it protects. Because the Maryland Three airports lie within the boundaries of the FRZ, all private air traffic operating from these airports must enter or exit the FRZ by the shortest possible route and must maintain a course away from downtown Washington, D.C.<sup>69</sup> Both the ADIZ and FRZ extended from the surface to 18,000 feet above the ground and were operated continuously.<sup>70</sup>

On December 16, 2008, the FAA announced its decision to codify the FRZ and ADIZ as of February 17, 2009.<sup>71</sup> This action, taken “to enable the Department of Homeland Security (DHS) and the Department of Defense (DOD) to effectively execute their respective constitutional and Congressionally-mandated duties to secure, protect, and defend the United States,” replaced the term ADIZ with “Special Flight Rules Area” (SFRA).<sup>72</sup> The new regulatory scheme made no change to previously-established ADIZ airspace boundaries—instead, the SFRA changed only minor procedural rules to fly in the National Capital Region and clarified existing requirements such as speed restrictions and pilot actions in the event of a transponder failure.<sup>73</sup> In codifying the DC SFRA, the FAA created no new airspace categories, but it clarified that the airspace within the SFRA is “national defense airspace” (NDA) and that an SFRA violation will subject the pilot to criminal prosecution at the discretion of the Department of Justice.<sup>74</sup>

A general aviation pilot desiring to either enter or exit the FRZ or SFRA is subject to numerous requirements. First, the pilot must file a DC SFRA flight plan within twenty-four hours of flight stating the departure aerodrome and SFRA exit point.<sup>75</sup> If

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<sup>69</sup> *Id.*

<sup>70</sup> KZDC NOTAM 7/0206, *supra* note 67; KZDC NOTAM 7/0211, *supra* note 68.

<sup>71</sup> Washington, DC Metropolitan Area Special Flight Rules Area, 73 Fed. Reg. 76,195 (Dec. 16, 2008) (to be codified at 14 C.F.R. pts. 1 and 93) [hereinafter Final Rule].

<sup>72</sup> *Id.* at 76,195–97.

<sup>73</sup> *Id.* at 76,200.

<sup>74</sup> *Id.* (citing 49 U.S.C. § 46307 (2000)). Interestingly, the FAA does not provide the text of the relevant portion of the U.S.C., which states criminal prosecution is limited to a fine under title 18, imprisonment for not more than one year, or both—essentially a misdemeanor. 49 U.S.C. § 46307.

<sup>75</sup> *See id.* at 76,214–15.

he or she requests an FRZ departure or arrival, the pilot must also provide the personal identification number issued during the SFAR 94 vetting process.<sup>76</sup> Second, the pilot must contact approach control via telephone immediately prior to takeoff from a DC SFRA or FRZ airport to receive a specific transponder code used while flying within the SFRA.<sup>77</sup> Third, the pilot must have an operable two-way radio so he or she can maintain continuous radio communication with air traffic control while within the SFRA.<sup>78</sup> Fourth, the pilot must have a working transponder capable of automatically reporting the aircraft's altitude.<sup>79</sup> Finally, the pilot must obtain clearance to fly within the borders of the airspace of any local airports such as Dulles or Baltimore-Washington International.<sup>80</sup>

The SFRA and FRZ are monitored by several governmental agencies. The air traffic controllers at Potomac Terminal Radar Approach Control (TRACON) are responsible for 23,000 square miles of airspace.<sup>81</sup> Potomac TRACON's radar data is simultaneously broadcast to a group of federal agencies collectively known as the National Capital Region Coordination Center (NCRCC).<sup>82</sup> The NCRCC is composed of representatives from the FAA, the Secret Service, the Capitol Police, the Department of Defense, the TSA, and the border patrol. In addition, the NCRCC is responsible for notifying the appropriate agency if an intercept is required.<sup>83</sup> The SFRA and FRZ are also monitored by North American Aerospace Defense Command (NORAD), a United States and Canadian organization charged with the missions of aerospace warning and control for North America.<sup>84</sup> Because aircraft are tracked by multiple governmental agencies, a communication service known as the Domestic Events Network (DEN) allows rapid dissemination of information to the

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Environmental Impact Statement, Potomac Consolidated TRACON Airspace Redesign, (Dec. 2002), *available at* [www.faa.gov](http://www.faa.gov).

<sup>82</sup> *See General Aviation Security for the Capitol Area: Hearing before the S. Comm. on Commerce, Science & Transp.*, 109th Cong. 2 (2005) (statement of Jonathan Fleming, Chief Operating Officer of the TSA) [hereinafter Senate Hearing].

<sup>83</sup> *Id.*

<sup>84</sup> North American Aerospace Defense Command, <http://www.norad.mil/about/index.html> (last visited May 24, 2009).

appropriate authorities.<sup>85</sup> Either Potomac TRACON, the NCRCC, or NORAD may use the DEN to notify the other agencies of a possible or ongoing SFRA violation. The decision to intercept an aircraft is made after a threat assessment is conducted by DHS and TSA officials.<sup>86</sup> These officials take into account factors including the aircraft's speed, heading, flight path, and altitude to determine if an aircraft poses a threat.<sup>87</sup>

### C. WHAT SECURITY COSTS: THE ECONOMIC AND PROFESSIONAL PRICE OF THE SFRA

SFRA violations near Washington, D.C. occur regularly. From the NCRCC's creation in January 2003 through June 2005, 3,369 airspace incursions were reported resulting in 1,411 pilot violations.<sup>88</sup> In 2006, Potomac TRACON reported 338 pilot violations, or an average of one a day.<sup>89</sup> By way of comparison, TRACON facilities of similar size throughout the United States process an average of fifty-four deviations per year.<sup>90</sup> The vast majority of these violations occurred when a pilot inadvertently changed his transponder code or did not enter the correct code prior to entering the ADIZ, although other violations occurred when pilots traveling cross country did not familiarize themselves with the ADIZ procedures before takeoff.<sup>91</sup> Violations also occurred through aircraft equipment failure when, unbeknownst to the aviator, his or her transponder or radio became intermittent and they were therefore unable to take prompt corrective action.<sup>92</sup> A recorded violation may have serious consequences for the aviator so charged. In addition to a suspension or revocation of his flight privileges, the pilot may face civil or criminal charges, may have his clearance to operate into or out of the Maryland Three removed, and may be subject to fines and charges for the cost of any military intercept operations.<sup>93</sup>

With the establishment of the DC SFRA, the FAA is likely to continue this pattern of pilot violations. In its Final Rule, the

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<sup>85</sup> See Senate Hearing, *supra* note 82.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Randy Horner, Air Traffic Control Support Specialist, Potomac TRACON, Presentation during an "Operation Raincheck" ADIZ Seminar (Aug. 18, 2007) (on file with author).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> NPRM, *supra* note 4, at 45,253.

FAA noted “knowing or willful violations of national defense airspace may subject the pilot to criminal liability” and “[t]he exercise of any prosecutorial decision to file criminal charges . . . is a decision that will be made by the appropriate Federal prosecutors . . . .”<sup>94</sup> Responding to pilot concerns that an amnesty program should be offered as an alternative to the FAA’s zero tolerance policy toward unintentional SFRA incursions, the FAA stated “[i]ncursions into this airspace, whether intentional or not, or violations of any other procedures or rules applicable to this airspace, are taken very seriously, and may be enforced in accordance with the FAA’s enforcement authority.”<sup>95</sup>

ADIZ restrictions have also imposed a severe financial burden on the general aviation community, resulting in an estimated \$43 million loss per year to the general aviation community.<sup>96</sup> Losses to the Maryland Three airports have been substantial—for example, after College Park airport was re-opened in February 2002, it suffered a ninety-two percent decrease in operations.<sup>97</sup> FRZ restrictions proved so deleterious that in 2005, Congress authorized financial compensation of \$17 million to those airports hit hardest by the rules, including \$5 million immediately available on a pro-rata basis.<sup>98</sup> These funds were made available “to reimburse fixed-based general aviation operators and the providers of general aviation ground support services . . . for direct and incremental financial losses incurred while such airports were closed to general aviation operations . . . due to the actions of the Federal Government following the terrorist attacks on the United States that occurred on September 11, 2001 . . . .”<sup>99</sup> Although this action provided some degree of relief for small airports in the DC area, the remedial effect of this legislation is limited to past actions only and makes no provision for financial losses incurred by the ongoing burdens imposed by the SFRA.

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<sup>94</sup> Final Rule, *supra* note 71, at 76,204.

<sup>95</sup> *Id.*

<sup>96</sup> AOPA Comment, *supra* note 6.

<sup>97</sup> *AOPA Tells Congress Opening Reagan National Only Part of the Job*, AOPA ONLINE, Mar. 16, 2004, available at <http://www.aopa.org/whatsnew/newsitems/2004/04-1-137.html>.

<sup>98</sup> Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, Pub. L. No. 109-115, § 185, 119 Stat. 2396, 2431 (2005); *Congress Provides \$5 Million Compensation for DC-3 Airports* AOPA ONLINE, Nov 22, 2005, available at <http://www.aopa.org/whatsnew/newsitems/2005/051122dc3.html>.

<sup>99</sup> § 185.

Because the ADIZ and FRZ were designed as a temporary measure, Congress has challenged the FAA's need to impose these restrictions. In 2003, Congress explicitly required the FAA to transmit a report justifying the ADIZ every sixty days until such time as the ADIZ is rescinded.<sup>100</sup> Although this report is classified, it must "include a description of any changes in procedures or requirements that could improve operational efficiency or minimize operational impacts of the ADIZ on pilots and controllers."<sup>101</sup> The FAA has confirmed that it "did not submit reports to Congress explaining the need for the DC SFRA," noting instead that the "Secretary of DHS . . . briefed Congress on the need for the DC SFRA" and that after four years had passed "the Congressional Research Service performed its own research on the aviation security needs in the Washington, D.C. Metropolitan Area."<sup>102</sup>

Congress also provided for an appeal process for pilots adversely affected through a finding that they represent a security risk to airline or passenger safety.<sup>103</sup> Although provisions exist for the protection of classified information, any U.S. citizen whose flight certificate is revoked is entitled to an on the record hearing that is not based on the findings of the FAA or DHS.<sup>104</sup> Finally, once the appeal has begun, the appellant is entitled to a written explanation of the administrative judge's determinations and all relevant documents used in making that determination.<sup>105</sup> The FAA and TSA have largely ignored this requirement with respect to ADIZ and FRZ violations, routinely resorting to disciplinary action without providing evidence to support its conclusion even when such evidence is requested by the pilot.<sup>106</sup>

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<sup>100</sup> Vision 100—Century of Aviation Reauthorization Act, Pub. L. No. 108-176, §602(a), 117 Stat. 2490, 2563 (2003).

<sup>101</sup> § 602(c).

<sup>102</sup> Final Rule, *supra* note 71, at 76,206.

<sup>103</sup> §601(d).

<sup>104</sup> § 601(b)–(c).

<sup>105</sup> § 601(f). Note that this does not include classified information and is limited to disclosure of only those documents "that the national security interests of the United States and other applicable laws permit." *Id.*

<sup>106</sup> See Phil Boyer, President, Aircraft Owner's and Pilot's Association, Remarks at Washington DC Metropolitan Area Special Flight Rules Area Public Meeting (Jan. 18, 2006), *available at* <http://www.regulations.gov/fdmspublic/ContentViewer?objectId=09000064802e94ee&disposition=attachment&contentType=pdf>.



#### IV. REGULATORY OVERSIGHT: HOW THE GOVERNMENT IS HELD ACCOUNTABLE

##### A. EXECUTIVE ORDER 12,866

Since the passage of the Government in the Sunshine Act,<sup>107</sup> Congress has expressed an intent to provide a government that is, for the most part, "fully accountable to [the people] for the actions which it supposedly takes on their behalf."<sup>108</sup> To further this objective, in 1993, President Clinton signed Executive Order (E.O.) 12,866 outlining the principles agencies must follow when promulgating regulations.<sup>109</sup> E.O. 12,866 grants the Office of Information and Regulatory Affairs (OIRA) the authority to review new significant regulations under consideration by a federal agency.<sup>110</sup> An action is "significant" if, among other things, it is likely to have an annual effect on the economy of at least \$100 million, adversely affects the economy or a sector of the economy, or "raise[s] novel legal or policy issues arising out of legal mandates . . . ."<sup>111</sup> If the OIRA determines that E.O. 12,866 applies, an agency may put forth only "regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people."<sup>112</sup>

Although E.O. 12,866 was part of President Clinton's reinventing government initiative, many regulatory agencies have ignored its requirements.<sup>113</sup> Rather than performing a thorough economic analysis within the required 120-day timeline, many agencies have opted to perform partial accounting of expected costs, have published economic analyses that are unclear or incomplete, or have failed to adequately explore alternative solutions.<sup>114</sup> As a result, E.O. 12,866's requirement to show that the benefits of a regulation justify the associated expense has, in practice, failed to ensure that decisions are made

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<sup>107</sup> 5 U.S.C. § 552(b) (2006).

<sup>108</sup> H.R. Rep. No. 94-880(I) (1976).

<sup>109</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

<sup>110</sup> See *id.* § 2(b).

<sup>111</sup> *Id.* § 3(f).

<sup>112</sup> *Id.* § 1.

<sup>113</sup> Robert W. Hahn et al., *Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866*, 23 HARV. J.L. & PUB. POL'Y 859, 860-61 (2000).

<sup>114</sup> *Id.* at 861.

that maximize the efficiency or effectiveness of a regulatory action.<sup>115</sup>

In its proposal to codify the FRZ and ADIZ, the FAA acknowledged its proposed rule is a “significant regulatory action” as defined in section 3(f) of E.O. 12,866.<sup>116</sup> However, the agency justified the codification by stating that the benefits of such a rule outweigh the associated costs.<sup>117</sup> In its Final Rule codifying the DC SFRA, the FAA acknowledged the SFRA “impacts aircraft operators, airports, and aviation-related businesses in the Washington, DC region,” “has reduced revenue at airports and aviation-related businesses,” and has “caused some operators . . . to cease operations altogether.”<sup>118</sup> Although the FAA estimates the loss to the public and private sector over ten years is at least \$1.04 billion, it asserts some costs may be minimized because, for example, some pilots “would fly to alternate airports outside the proposed DC SFRA, resulting in an increase in operations and revenue for these alternate airports.”<sup>119</sup> The FAA admits that it does not have complete data on the economic impact of its proposal, noting that the ADIZ affects “approximately 150 airports” and “the FAA does not know if these . . . provisions would have a significant impact on a substantial number of all those airports.”<sup>120</sup> Although it is admittedly difficult to quantify the price of secure airspace over a densely populated area, the FAA seems to have vastly underestimated the economic burden on local airports and associated businesses. One estimate, for example, places the private sector costs of the ADIZ at a minimum of \$43 million annually—far in excess of the \$29.6 million annual cost proposed by the FAA.<sup>121</sup>

## B. THE UNFUNDED MANDATES REFORM ACT

Similarly, federal agencies may not create rules that impose a significant financial burden on state or local governments without providing funding to carry out its rules. Pursuant to the Unfunded Mandates Reform Act (UMRA), the federal government must perform a cost-benefit analysis before putting in place regulations that “impos[e] unfunded Federal mandates on States

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<sup>115</sup> *Id.* at 877.

<sup>116</sup> NPRM, *supra* note 4, at 45,255.

<sup>117</sup> *Id.*

<sup>118</sup> Final Rule, *supra* note 71, at 76,209.

<sup>119</sup> NPRM, *supra* note 4, at 45,257.

<sup>120</sup> *Id.*

<sup>121</sup> AOPA Comment, *supra* note 6, at 7.

and local governments.”<sup>122</sup> To achieve this goal, the UMRA requires that the Congressional Budget Office (CBO) conduct a thorough cost analysis and compare the cost findings of the CBO to those of the agency proposing the new rules.<sup>123</sup> If the CBO finds that the federal government is significantly shifting the costs associated with the new regulations to state or local authorities, the agency’s actions may be invalidated.<sup>124</sup>

As with the requirements of E.O. 12,866, many federal agencies have either ignored or watered down the requirements of the UMRA. Although agencies are required to consider the “least costly, most cost-effective, or least burdensome alternative” before promulgating regulations, many state and local governments still bear the burden of federal regulation.<sup>125</sup> Indeed, many small businesses are now subject to the costs of federal policies through unforeseen expenses such as health insurance, workers’ compensation, and other federally mandated employee compensation associated with carrying out agency requirements.<sup>126</sup>

The FAA claims its proposed regulatory requirement “does not impose an unfunded mandate on state, local, or tribal governments, or on the private sector.”<sup>127</sup> Because the FAA concludes that no state, local or tribal government, or any member of the private sector, will be required to face “an expenditure of \$100 million or more (adjusted annually for inflation) in any one year,” the UMRA is not applicable.<sup>128</sup> Yet the FAA has acknowledged its assessment of the financial costs associated with the ADIZ and FRZ is not wholly complete and invited comments to obtain a better understanding of the monetary impact of its rule.<sup>129</sup> Although the gap between the FAA’s cost estimate and the \$100 million threshold is large, it is not unreasonable to compel the CBO to conduct a UMRA analysis because the pro-

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<sup>122</sup> Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified at 2 U.S.C. 1501 (2000)).

<sup>123</sup> 2 U.S.C. § 1511 (2000).

<sup>124</sup> 2 U.S.C. § 1513 (2000).

<sup>125</sup> Angela Antonelli, *Promises Unfulfilled: Unfunded Mandates Reform Act of 1995*, CATO INSTITUTE, Spring 1996, at 48, available at <http://www.cato.org/pubs/regulation/regv19n2/v19n2-5.pdf>.

<sup>126</sup> See generally Angela Antonelli, *The Senate’s Opportunity to Shine a Light on Proposed Federal Mandates*, HERITAGE FOUNDATION BACKGROUNDER, April 2, 1999, available at [http://www.heritage.org/research/regulation/upload/18429\\_1.pdf](http://www.heritage.org/research/regulation/upload/18429_1.pdf).

<sup>127</sup> NPRM, *supra* note 4, at 45,255.

<sup>128</sup> *Id.* at 45,259.

<sup>129</sup> *Id.* at 45,250.

posed rule imposes very significant yet undetermined costs on not only the federal government, but also the private sector. Further, the CBO is likely the best agency to determine whether the FAA's understanding of the true nature of the costs of its rulemaking proposal is accurate.

### C. REGULATORY TAKINGS AND *AIR PEGASUS*

Since its inception, the TSA has come under scrutiny by public and private groups alleging it has overused its power through broad claims of protection.<sup>130</sup> The same may be argued for those airports affected by the ADIZ and FRZ—although not officially closed by the government, airports and heliports within the FRZ have seen operations decrease to such an extent that many have either gone out of business or been forced to reduce services to a fraction of their pre-9/11 levels. This end-game may be considered an unlawful regulatory taking, which is prohibited by the Constitution.

Although governments typically have broad police powers, those powers may not create a circumstance where private property has been divested through either an outright taking of title or a *de facto* situation where a party is constructively deprived of its property.<sup>131</sup> The Fifth Amendment prohibits such a taking by requiring “just compensation” if private property is taken for public use.<sup>132</sup> In determining what qualifies as “property,” the Supreme Court has held that the Fifth Amendment applies to property of state and local governments as well as that of private citizens.<sup>133</sup> Further, a legally protected property interest is not limited to tangible goods or services—a financial loss resulting from an economic interest or advantage in property is sufficient to trigger Fifth Amendment protection.<sup>134</sup>

Additionally, the Court recognizes that over-regulation of private property may, in some instances, “be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such ‘regulatory takings’ may be compensable under the *Fifth Amendment*.”<sup>135</sup> Generally, a regulatory action is deemed to be a taking if the action is one that is functionally equivalent to a

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<sup>130</sup> Sara Kehaulani Goo, *Air Security Agency Faces Reduced Role*, WASH. POST, Apr. 8, 2005, at A01.

<sup>131</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413–15 (1922).

<sup>132</sup> U.S. Const. amend. V.

<sup>133</sup> *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984).

<sup>134</sup> *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945).

<sup>135</sup> *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

direct appropriation of or ouster from private property, and courts will look to the severity of the burden that government imposes upon property rights when making such a determination.<sup>136</sup> The Supreme Court recently clarified the standing requirements for determining what constitutes a regulatory taking: an uncompensated taking of private property may proceed by alleging a “physical” taking, “total regulatory taking,” a taking through an evaluation of the economic impact and character of the governmental action, or a land-use exaction excluding others from entering and using their property.<sup>137</sup>

In *Air Pegasus of D.C., Inc. v. United States*, the U.S. Court of Appeals examined the scope of a regulatory takings claim arising from airspace restrictions over Washington, D.C.<sup>138</sup> Air Pegasus, owner and operator of a heliport a mile and a half south of the U.S. Capitol building, ceased operations on September 30, 2002 as a result of the FAA’s prohibition on all commercial flights not originating from Reagan National Airport.<sup>139</sup> The court stated that, for a regulatory takings claim to succeed, the claimant “must, at a minimum, assert that *its* property interest was actually taken by the government action.”<sup>140</sup> The court, noting that “there is a significant difference between an *injury* to one’s property interest and a *taking* of one’s property interest,” held that the FAA had not “taken” the real property interest in question—Air Pegasus’ leasehold permitting third parties to operate helicopters from its helipad—but rather had only been economically harmed by the FAA’s restrictions.<sup>141</sup>

The court also disagreed that Air Pegasus had a “right of access to the navigable airspace from its heliport.”<sup>142</sup> Although the court hinted that Air Pegasus had the right to use the non-navigable airspace immediately above its leasehold, it reiterated the well-established principle “that the navigable airspace is public property not subject to private ownership.”<sup>143</sup> The court likewise dismissed the argument that the FAA acted outside its navigational servitude permitting private parties (the “servient tenement”) to operate within its airspace, holding that “because

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 548.

<sup>138</sup> 424 F.3d 1206, 1208 (Fed. Cir. 2005).

<sup>139</sup> *Id.* at 1208, 1210.

<sup>140</sup> *Id.* at 1215.

<sup>141</sup> *Id.* at 1216.

<sup>142</sup> *Id.* at 1217.

<sup>143</sup> *Id.*

there is no private property interest here to which the government's servitude could attach, we do not see how the principles underlying the servitude are relevant to this case."<sup>144</sup>

The *Air Pegasus* holding is compelling for several reasons. First, the Circuit Court of Appeals seemingly affirmed the lower court's holding that "Air Pegasus entered this highly regulated area, in Washington D.C., with the knowledge that the government reserved the power, and indeed regularly exercised its power, to restrict air flight patterns and procedures,"<sup>145</sup> further noting that "the air is a public highway."<sup>146</sup> In response, the dissent pointed out that although the FAA has the right to control the nation's navigable airspace, the airspace restrictions in question were "taken abruptly and without notice, transcend[ing] any reasonably foreseeable regulatory action."<sup>147</sup> In the dissent's view, "even 'pervasive' regulation does not preclude application of *Fifth Amendment* principles," and that the majority notably avoided addressing the fundamental question of whether "Air Pegasus [can] be reasonably charged with accepting the commercial risk of the 9/11 terrorist attacks and the immediate government response by closing the airspace."<sup>148</sup>

Second, the majority found that because the events leading to Air Pegasus' failure resulted from "an extraordinary response to a catastrophic event," the "unforeseeable governmental action rendered Air Pegasus' leasehold valueless."<sup>149</sup> However, this holding—that those who own a lease permitting aircraft to take off and land cannot survive a Fifth Amendment regulatory takings claim—is narrow. Air Pegasus owned neither the aircraft that flew from its helipad nor the building on which the helipad was based. The *Air Pegasus* court did not address possible causes of action from aircraft or airport owners, stating only that the Fifth Amendment provides no remedy for derivative claims "based on a perceived taking of property owned by other parties."<sup>150</sup>

When the FAA codified the DC SFRA, it stated that because "airspace is not private property," its restrictions "do not constitute a taking of private property without due process or just

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<sup>144</sup> *Id.* at 1219.

<sup>145</sup> *Air Pegasus of D.C., Inc. v. United States*, 60 Fed. Cl. 448, 457 (2004).

<sup>146</sup> *Air Pegasus*, 424 F.3d at 1217.

<sup>147</sup> *Id.* at 1220 (Newman, J., dissenting).

<sup>148</sup> *Id.* at 1221–22.

<sup>149</sup> *Id.* at 1220.

<sup>150</sup> *Id.* at 1219.

compensation.”<sup>151</sup> The FAA argued that the “indirect economic cost and personal inconvenience is not an impact unique to the general aviation community or the Washington, DC area,” but is an “impact experienced by many individuals and businesses in all areas of commerce as a result of the variety and scope of new security measures imposed . . . after the September 11, 2001 attacks.”<sup>152</sup> Although the economic effect the FAA mentions is undeniable, it is noteworthy that no aircraft owners and operators, nor any airports, have filed suit, nor has the FAA offered a legal interpretation of its actions.

Additionally, although the TSA and FAA have not exercised full physical control over airports within the DC SFRA, its NPRM asserting its jurisdiction over the Maryland Three airports within the FRZ is, according to the TSA, required it to prevent these airports from being “closed due to the FAA requirements.”<sup>153</sup> The TSA argues that because its rules “enhance[ ] protection for a significant number of vital government assets in the National Capital Region,” a failure to implement these rules would justify permanent closure of economically viable airports.<sup>154</sup> The TSA fails to point out that Reagan National Airport, with much larger aircraft capable of far greater damage, remains open largely because there was no political support for its permanent closure. Additionally, the TSA acknowledges that a small aircraft’s impact “may not cause substantial damage to property or a large structure,” but steadfastly reiterates that without these rules, a complete taking through a physical closure of, as a minimum, the Maryland Three airports would be necessary.<sup>155</sup>

Should the TSA permanently close all of the private airports near downtown Washington, D.C., it would almost certainly be liable for a regulatory taking. “[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”<sup>156</sup> The TSA’s

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<sup>151</sup> Final Rule, *supra* note 71, at 76,207.

<sup>152</sup> *Id.*

<sup>153</sup> Maryland Three Airports: Enhanced Security Procedures for Operations at Certain Airports in the Washington, DC, Metropolitan Area Flight Restricted Zone, 70 Fed. Reg. 7150, 7160 (Feb. 10, 2005) (to be codified at 49 C.F.R. pt. 1562).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

mission, to “protect[ ] the Nation’s transportation systems to ensure freedom of movement for people and commerce,”<sup>157</sup> is one that is done no doubt for the common good. As such, any TSA action that permanently shuts down an airport is presumably done to protect a larger group of individuals and should thus be construed as a taking.

This interpretation seemingly coincides with Congress’s decision to appropriate \$17 million to airports affected by the ADIZ and FRZ, an action which could reasonably be interpreted as a pre-emptive measure against possible Fifth Amendment takings claims.<sup>158</sup> However, because this measure was designed to compensate for losses incurred as a result of post-9/11 security measures and did not address the ongoing financial losses suffered since the passage of the Appropriations Act in 2006, a takings claim may still be warranted should the TSA take additional measures.

#### D. *CHEVRON* DEFERENCE

To ensure the courts do not become overly political, executive agencies are normally entitled to a good deal of deference when interpreting an otherwise ambiguous statute.<sup>159</sup> Under the *Chevron* deference, courts apply a two-part test when evaluating the legality of an executive agency’s statutory interpretation.<sup>160</sup> First, courts look to whether Congress has clearly and unambiguously spoken to the question at issue.<sup>161</sup> Second, if Congress has not spoken, courts look to whether the agency’s interpretation is “based on a permissible construction of the statute.”<sup>162</sup> The *Chevron* doctrine not only acknowledges that more than one reasonable statutory interpretation may exist, it also legitimizes policy choices that have been left open by Congress.<sup>163</sup>

This seemingly sweeping doctrine is not without limitations. Ten years after *Chevron*, the Supreme Court clarified that “an

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<sup>157</sup> Transportation Security Administration Mission, Vision, and Core Values, [http://www.tsa.gov/who\\_we\\_are/mission.shm](http://www.tsa.gov/who_we_are/mission.shm) (last visited May 24, 2009).

<sup>158</sup> Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, Pub. L. No. 109-115, § 185, 119 Stat. 2396, 2431 (2005).

<sup>159</sup> *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 838 (1984).

<sup>160</sup> *Id.* at 842.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 843.

<sup>163</sup> *Id.* at 843–44.



agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."<sup>164</sup> Indeed, agencies may not lawfully implement "a fundamental revision of the statute" that departs from the "idea Congress enacted into law . . . ."<sup>165</sup> The Court later clarified the extent of the *Chevron* doctrine when it held that an agency's statutory construction "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."<sup>166</sup> There may, the Court acknowledged, "be reason to hesitate before concluding that Congress has intended such an implicit delegation."<sup>167</sup>

The SFRA and FRZ exist not because of statutory interpretation, but because of an executive agency's assertion that these restrictions are necessary to protect the security of our nation's capital. The more fundamental question is therefore not the extent to which the *Chevron* deference applies, but whether *Chevron* applies at all. Responding to numerous legal concerns about the reach of *Chevron*, the Supreme Court has created a "Step Zero" analysis to determine if *Chevron* is triggered as a question of law.<sup>168</sup> In a trilogy of cases, the Court held that *Chevron* applies when agency decisions arise from congressionally-delegated authority to act with the force of law.<sup>169</sup> Although presumably designed to delineate the point at which *Chevron* attaches, the "Step Zero" analysis has in fact resulted in more confusion and complexity among lower courts.<sup>170</sup> Rather than looking to statutory language to determine the extent of an agency's authority, courts must first determine if Congress "delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."<sup>171</sup> If Congress "would expect the agency to be able to speak with

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<sup>164</sup> *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 229 (1994).

<sup>165</sup> *See id.* at 231–32.

<sup>166</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

<sup>167</sup> *Id.*

<sup>168</sup> *See* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

<sup>169</sup> *Barnhart v. Walton*, 535 U.S. 212, 217–22 (2002); *United States v. Meade Corp.*, 533 U.S. 218, 229 (2001); *see* *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

<sup>170</sup> *See* Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2602 (2006).

<sup>171</sup> *Meade*, 533 U.S. at 226–27.

the force of law,” it is likely the agency is entitled to *Chevron* deference.<sup>172</sup>

The “force of law” test is ambiguous because it places the burden on litigants and the courts to determine congressional intent. The leading “Step Zero” case, *United States v. Meade Corp.*, offers limited guidance, stating only that delegation of the force of law “may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.”<sup>173</sup> It is therefore instructive to review the FAA’s enabling statute to determine both if Congress intended for the FAA to act with the force of law and, if so, to what extent. 49 U.S.C. § 40101 provides, in part:

(c) General safety considerations.— . . . the Administrator of the Federal Aviation Administration shall consider the following matters:

- (1) the requirements of national defense and commercial and general aviation.
- (2) the public right of freedom of transit through the navigable airspace.<sup>174</sup>

In balancing the requirements of national defense against the public interest, Congress directs:

(d) Safety considerations in public interest.— . . . the Administrator shall consider the following matters, among others, as being in the public interest:

- (1) assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce.
- (2) regulating air commerce in a way that best promotes safety and fulfills national defense requirements . . . .
- (4) controlling the use of the navigable airspace and regulating civil and military operations in that airspace in the interest of the safety and efficiency of both of those operations . . . .<sup>175</sup>

It is clear that Congress intended that the FAA manage aviation matters concerning national security and balance that requirement against both the safety of those involved and the general right of access to navigable airspace. When attempting to codify the ADIZ and FRZ, both the TSA and FAA held open

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<sup>172</sup> *Id.* at 229.

<sup>173</sup> *Id.* at 226–27.

<sup>174</sup> 49 U.S.C. § 40101(c) (2000).

<sup>175</sup> *Id.* at § 40101(d).

discussions and invited public scrutiny through a lengthy notice of proposed rulemaking procedure.<sup>176</sup> Consequently, under a "Step Zero" analysis it seems *Chevron* applies. Although several judicial "Step Zero" questions remain unanswered—for example, whether an agency receives deference when deciding on its own jurisdiction or when stating that its own decisions are not subject to judicial review—the language of the FAA's enabling statute is sufficiently clear to argue that the codification of the FRZ and ADIZ falls within its authority.

The legality of the SFRA becomes less certain under *Chevron* itself. It is evident that although Congress authorized the FAA to coordinate airspace to serve the public interest, it did not speak directly to the overly burdensome "solution" presented by the SFRA. To survive judicial scrutiny in a *Chevron* analysis, the FAA's interpretation of its statutory authority must be reasonable and permissible.<sup>177</sup> This interpretation does not necessarily have to be the correct one, nor is the court required to conclude "that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."<sup>178</sup>

However, the FAA's interpretation must not be contrary to congressional intent. Although the FAA asserts it has acted well within its authority, it has arguably created a system that has undermined its mission of promoting air commerce. While the FAA may certainly create airspace to protect the nation's populace, it must have a compelling reason to do so, and the threat of minimal damage by a small aircraft with virtually no chance of causing mass casualties does not meet this standard. Further, when considered against the backdrop that neither the TSA nor the FAA has any viable intelligence suggesting the use of a general aviation aircraft as a weapon of mass destruction is even remotely plausible,<sup>179</sup> its rationale for implementing a system that deprives pilots of their lawful use of the airspace above them is even more absurd.

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<sup>176</sup> See Washington, DC Metropolitan Area Special Flight Rules Area, 70 Fed. Reg. 45,250 (Aug. 4, 2005).

<sup>177</sup> *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 843–44 (1984).

<sup>178</sup> *Id.* at 843 n.11.

<sup>179</sup> In its Final Rule, the FAA states that intelligence reports have not specified an imminent threat of attack in the NCR, noting only that "some extremists have considered using small aircraft for terrorist activities." See Final Rule, *supra* note 71, at 76,201.

E. THE EXECUTIVE'S DEFERENCE IN MATTERS  
OF NATIONAL SECURITY

Beneath the claims that the TSA and the FAA have defied congressional intent by promulgating rules that are neither procedurally correct nor entitled to deference lies the larger argument that such measures are absolutely essential given that protection of the National Capital Region is a matter of national security. Indeed, courts have historically given substantial deference to the President concerning his power to protect the nation both at home and abroad.<sup>180</sup> The deference accorded this power is greater than that provided in *Chevron* because it arises under the President's Article II powers instead of Congress's Article I authority. Specifically, Article II of the Constitution states "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . . ."<sup>181</sup>

Deference may also be given to the executive when the President invokes his Article II powers as Commander in Chief and in international matters. The Supreme Court has declared that Congress "must often accord to the President a degree of discretion and freedom from statutory restriction" in foreign affairs matters.<sup>182</sup> This deference extends to matters of national security. For example, in the landmark case *Department of the Navy v. Egan*, the Court ruled that the substance of a hearing before the Board reviewing security clearance matters was at the discretion of the agency charged by the Executive Branch with making this "sensitive and inherently discretionary judgment call."<sup>183</sup> Yet the Court did not limit its analysis to matters involving only the protection of sensitive information from unauthorized personnel. In an unusually broad reading of the Executive's Article II powers, the Court held the government's authority to withhold "national security information from unauthorized persons in the course of executive business . . . falls on the President as head of the Executive Branch and as Commander in Chief," and that "courts traditionally [should be] reluctant to intrude upon the

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<sup>180</sup> See *United States v. Reynolds*, 345 U.S. 1, 9–10 (1953) (holding executive privilege appropriate where evidence exposure of military documents may compromise national security); *Totten v. United States*, 92 U.S. 105, 106–07 (1875) (dismissing contract claim to protect civil war era espionage relationship).

<sup>181</sup> U.S. Const. art. II, § 2.

<sup>182</sup> *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 320 (1936).

<sup>183</sup> 484 U.S. 518, 527 (1988).

authority of the Executive in military and national security affairs”<sup>184</sup>

However, courts have not allowed the President unfettered authority even in matters of national security—as is the case with *Chevron* deference, this Article II deference to the President is not absolute. For example, as the Supreme Court articulated in *Hamdan v. Rumsfeld*, the executive is not allowed to hold suspected terrorists in violation of their due process rights.<sup>185</sup> In *Hamdan*, the Secretary of Defense argued that critical national security concerns constituted a legitimate suspension of *habeas corpus*, but the Supreme Court disagreed, stating that the President may only deprive an individual of the protections of the judiciary in “cases of a controlling necessity.”<sup>186</sup> Further, the Court held that the Executive cannot take any action “incompatible with the expressed or implied will of Congress” regardless of the reason.<sup>187</sup> Although the decision in *Hamdan* was watered down by the subsequent passage of the Military Commissions Act of 2006,<sup>188</sup> the lesson was clear—absent express congressional authority, the power of the Executive has limits. As Justice Breyer stated in his concurring opinion:

Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger. To the contrary, that insistence strengthens the Nation’s ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means.<sup>189</sup>

In requiring the FAA to justify its creation of the ADIZ, Congress apparently balked at the restrictions placed on the general aviation community. In refusing to comply with that requirement, the FAA circumvented the democratic process through sweeping claims of national security. However, these claims are at best tenuous and at worst a deprivation of the freedoms granted by the Constitution. Providing even a simple justification that would satisfy Congress would allow public scrutiny of the arbitrary airspace rule that currently penalizes a smaller class

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<sup>184</sup> *Id.* at 527, 530.

<sup>185</sup> 548 U.S. 557, 589–90 (2006).

<sup>186</sup> *Id.* at 592.

<sup>187</sup> *Id.* at 638–39 (Kennedy, J., concurring).

<sup>188</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

<sup>189</sup> *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring).

of persons in favor of a claimed, but nonexistent, protection of a larger class of persons.

Such a justification may be hard to come by. In its NPRM, the FAA neglects to mention that the aircraft that attacked the Pentagon came not from an airport within the FRZ, but from Dulles. The FAA also fails to address the fact that the amount of damage a small aircraft could cause is minimal. Because the vast majority of general aviation airplanes are lightweight single-engine aircraft with six or fewer seats, they can carry a very limited payload and travel only at relatively slow speeds.<sup>190</sup> One recent report estimated that it would take more than one thousand small planes acting as one to equal the destructive potential of a single airliner.<sup>191</sup> Although it is true that even a payload of several hundred pounds of chemical, biological, or nuclear material could, theoretically, cause substantial damage, it is highly unlikely that such an attack could be successfully carried out. The logistics in obtaining such material, weaponizing it, creating a viable delivery system, placing it into a small aircraft unnoticed, and then getting close enough to cause substantial damage make such an attack virtually impossible.<sup>192</sup> Indeed, in its Final Rule, the FAA stated that “an aircraft, regardless of size, could be used to transport individuals with criminal intentions or dangerous materials that could do significant harm to the NCR,” but offered only a vague “concern that terrorists may turn to general aviation as an alternative method for conducting operations” as evidence supporting its claim.<sup>193</sup>

## V. CLEARANCE AVAILABLE: BALANCING FREEDOM AND SECURITY

Because the FAA and TSA have provided solutions that are both impractical and overreaching, alternative remedies must be pursued to best provide for security over both the nation’s capital and other cities with large populations and key assets to protect. Several solutions exist, many of which do not have the economic shortcomings or the heavy-handedness of the current approach.

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<sup>190</sup> General Aviation Serves America, GA Aircraft are Not a Threat—Small and Slow, <http://www.gaservesamerica.com/gasecurity/gaaircraft.html> (last visited May 24, 2009).

<sup>191</sup> *Id.*

<sup>192</sup> See *The Terror Next Time? Nuclear, Chemical and Biological Threats*, ECONOMIST, Oct. 6, 2001, at 73.

<sup>193</sup> Final Rule, *supra* note 71, at 76,201–02.

## A. DEVELOP AN ELECTRONIC PILOT CERTIFICATE

In October 2005, the State Department mandated that all U.S. passports be issued with a small electronic chip containing information about the passport's bearer, including basic personal information and a digital photograph.<sup>194</sup> These "electronic passports" are globally interoperable, contain "digital signatures" designed to prevent tampering, and only broadcast personal information when placed within ten centimeters of an authorized chip reader.<sup>195</sup> The International Civil Aviation Organization developed the specifications for this technology, which is intended to provide further assurance at all points of entry that the bearer of a passport is the same person listed therein.<sup>196</sup>

Electronic identification is also being used to pre-screen airline passengers, allowing them to travel through an "express lane" and bypass many security checkpoints. Through a system known as "fly clear," the TSA pre-screens passengers who, after application approval, are provided with a card that allows them to pass through special security lanes at certain airports.<sup>197</sup> The card contains more information than that found on an electronic passport, including either a fingerprint or retinal image provided by members during enrollment.<sup>198</sup>

Unfortunately, the FAA has not made similar advances in technology regarding pilot certification. Currently, pilots receive plastic "credit card" style certificates that contain neither a photograph nor an electronic chip.<sup>199</sup> After many years of debate on how to implement a system to replace paper certificates, in February 2008 the FAA released its Final Rule mandating all pilots receive a new plastic certificate by 2010.<sup>200</sup> In the Final Rule, the FAA concedes that although the Intelligence Reform

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<sup>194</sup> Electronic Passport Rule, 70 Fed. Reg. 61,553, 61,555 (Oct. 25, 2005) (to be codified at 22 C.F.R. pt. 51).

<sup>195</sup> *Id.* at 61,553.

<sup>196</sup> *Id.*

<sup>197</sup> Flyclear.com, Membership Agreement, [http://www.flyclear.com/apply/apply\\_membershipagreement.html](http://www.flyclear.com/apply/apply_membershipagreement.html) (last visited May 24, 2009); Flyclear.com, Frequently Asked Questions, <http://www.flyclear.com/faq> (last visited May 24, 2009).

<sup>198</sup> *Id.*

<sup>199</sup> AOPA Online, Regulatory Brief: FAA Security-Enhanced Pilot Certificates, <http://aopa.org/whatsnew/regulatory/certificates.html> (last visited May 24, 2009).

<sup>200</sup> Drug Enforcement Assistance, 73 Fed. Reg. 10,662 (Feb. 28, 2008) (to be codified at 14 C.F.R. pts. 47, 61, 63, 65).

and Terrorism Prevention Act of 2004 requires the inclusion of digital photographs on pilot certificates, it is “currently evaluating its options with regard to the best method to meet this requirement . . . .”<sup>201</sup> Because the FAA is willing, for the time being, to require only that pilots carry another form of photo identification with them to validate the authenticity of their certificates, it is likely that an electronic certificate is at least a decade away.

This policy is misguided for several reasons. First, an electronic certificate would allow all pilots, not merely those in the Washington, D.C. area, to be vetted at the time the certificate is issued. Such a procedure would largely eliminate concerns about the wayward pilot who wishes to land at a Maryland Three airport but must wait up to two months for approval. Second, e-certification would simplify flight operation by allowing pilots to check in by touching their card to a reader prior to flight. If properly networked, a pilot’s card swipe could also pre-file his departure flight plan with air traffic control and would provide a record of that pilot’s activity should any security concerns arise. Finally, an e-certificate would make great strides in reducing the number of pilots who fly with an expired checkride or invalid medical certificate by alerting the FAA should such a pilot wish to take off.

#### B. CREATE A SERIES OF AIRSPACE CORRIDORS OVER LARGE CITIES

Another proposal, first advanced by the Aircraft Owners and Pilots Association (AOPA) in 2003, is establishing corridors designed to go to specific destinations.<sup>202</sup> Pilots flying along these corridors would be required to use a specific transponder code matched to a specific airport and would therefore be “known” to the air traffic controller and security personnel.<sup>203</sup> Additionally, specific radio frequencies and altitudes could be established for entry and exit into airports surrounding major metropolitan areas, and these items could be published in the navigational charts pilots are required to carry.

Because of current equipment limitations, many transponder codes are “recycled” and used by other aircraft, so a permanent

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<sup>201</sup> *Id.* at 10,664.

<sup>202</sup> *Key Senators Bring ADIZ Players Together*, AOPA ONLINE, Sept. 14, 2006, available at <http://www.aopa.org/whatsnew/newsitems/2006/060914adiz.html>.

<sup>203</sup> *Id.*



code could not be issued to each airplane. This problem has two solutions: either assign codes to the corridors themselves and allow all aircraft ingressing or egressing the airport in question to use those codes, or upgrade the current avionics system to allow more codes than the current 4,096 available from existing World War II era technology.<sup>204</sup> The first solution is more easily put into place, as it has virtually no cost and requires only minimal training for the pilot, but might raise security concerns because a pilot who simply enters in a code published on a chart has not been properly assessed as a threat. However, such a system would be virtually identical to that implemented in the ADIZ, with the only difference being that the pilot under the current system makes a phone call to get his code instead of reading it from a chart. While it is true that the phone call also gives air traffic control more information about the airplane itself, such information is of no value in stopping a determined attacker with no regard for the safety of his aircraft.

The second solution has already been implemented throughout much of the commercial aviation industry. Rather than replace the conventional transponders, the ICAO has implemented a system dubbed "Mode-S" that provides a unique identification number to all aircraft.<sup>205</sup> Mode S, based on a 24-bit algorithm, allows for over sixteen million unique codes and is therefore in no danger of becoming obsolete.<sup>206</sup> The phased installation of Mode S transponders is already a fundamental part of the next generation of airplane avionics which will allow for much easier transmission of aircraft data to not only monitoring stations on the ground but also other airborne aircraft.<sup>207</sup> Unfortunately, the new systems can be costly—upwards of several thousand dollars each—so mandating such a change may prove prohibitive for aircraft owners on a tight budget.<sup>208</sup>

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<sup>204</sup> George M. Moore and James D. Caven, *Free Flight Technology Requirements and Liability Issues That May Arise For Equipment Manufacturers*, 62 J. AIR L. & COM. 687, 691 (1987).

<sup>205</sup> See Eurocontrol, Mode S Technical Overview, [http://www.eurocontrol.int/msa/public/standard\\_page/modes\\_tech\\_overview.html](http://www.eurocontrol.int/msa/public/standard_page/modes_tech_overview.html) (last visited May 24, 2009).

<sup>206</sup> David Jensen, *Europe's Energized Mode S Program*, AVIONICS MAG., Apr. 1, 2003, available at <http://www.aviationtoday.com/av/issue/feature/808.html>.

<sup>207</sup> See *id.*

<sup>208</sup> See, e.g., Press Release, Garmin Announces GTX(TM) 328 Mode S Transponder (Jan. 31, 2007), available at <http://news.thomasnet.com/fullstory/802228>.

Regardless, the use of corridors and matching transponder codes would potentially identify the plane, the pilot, and the destination. Keeping these components in place, currently the cornerstone of the existing DC SFRA and FRZ, would allow the alteration or elimination of the SFRA without compromising security in any way.

C. DEACTIVATE THE ADIZ AND REACTIVATE IT WHEN AN IDENTIFIED THREAT EXISTS

Airspace restrictions over sensitive areas are not new. In 1938, “the President reserved and set apart airspace for national defense, the public safety and other governmental purposes.”<sup>209</sup> These airspace reservations later became known as “prohibited areas” and are widely used today to prevent overflight of regions that are restricted in the name of national security.<sup>210</sup> The size and shape of these areas can change—for example, Prohibited Area 56 (P-56), the airspace over and near the White House, has been altered in response to world events.<sup>211</sup> Additionally, the area near the Presidential retreat at Camp David (P-40), increases in size from three to ten nautical miles and increases in size up to 18,000 feet when in use.<sup>212</sup> Rules governing prohibited areas are strictly enforced—no person may operate an aircraft within a prohibited area unless authorization has been granted by the agency responsible for the airspace, and violations are routinely enforced.<sup>213</sup>

It would therefore be relatively simple to create a new prohibited area encompassing much of downtown Washington, D.C. Like P-40, this area could be expanded based on the threat level established by the DHS. Waivers could be obtained much as they are under the existing SFRA for law enforcement personnel or military aircraft, and when the threat level is sufficiently low, no such waiver would be required. Implementing a flexible airspace regime would decrease the workload on not only the air traffic controllers, but also those at the NCRCC and NORAD who monitor the airspace for errant aircraft. Such a system requires the DHS to provide accurate intelligence regarding potential airborne terrorist attacks, but obtaining that information

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<sup>209</sup> NPRM, *supra* note 4, at 45,252.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Brown, *supra* note 56, at 3.

<sup>213</sup> NPRM, *supra* note 4, at 45,252.

is precisely why the agency was created. The current system, created around the broad premise that every pilot may be a terrorist, is not only unwieldy but may also create a false sense of security by incorrectly assuming that attacks are stopped simply by requiring a would-be terrorist to make a phone call prior to takeoff.

## VI. CONCLUSION

When justifying the rule requiring its control over the Maryland Three airports, the TSA stated that although the damage from a small aircraft would likely be negligible, a small aircraft attack could result in "an undetermined number of fatalities and injuries and reduced tourism" that "would adversely impact the regional economies."<sup>214</sup> The TSA therefore concluded that the benefits associated with its final rule "vastly exceed the costs."<sup>215</sup> This would be equally true over any large city, yet no similar procedure has been implemented anywhere else in the United States.

Additionally, previous experience shows that the threat associated with small aircraft is virtually nonexistent. A single-engine airplane that crashed into a downtown building in Tampa, Florida in 2001 did little damage,<sup>216</sup> and the majority of repairs from another single-engine crash into a New York City apartment building in 2006 were needed because of water damage from the fire suppression system, or walls that were destroyed by fire fighters in search of people and pets.<sup>217</sup> Indeed, in 1994 a small aircraft crashed on the south lawn of the White House, killing the pilot but causing no damage to anything but the aircraft.<sup>218</sup>

Given the profound lapses in security that led to our current threat environment, it is both unsurprising and necessary that aviation security be taken very seriously. However, the heavy-handed implementation of our current policies only marginally

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<sup>214</sup> Maryland Three Airports: Enhanced Security Procedures for Operations at Certain Airports in the Washington, DC, Metropolitan Area Flight Restricted Zone, 70 Fed. Reg. 7150, 7160 (Feb. 10, 2005) (to be codified at 49 C.F.R. pt 1562).

<sup>215</sup> *Id.*

<sup>216</sup> John Woolfolk & Aaron Davis, *How Safe are Smaller Airports? Florida Crash Raises Concerns About General Aviation Access*, SAN JOSE MERCURY NEWS, Jan. 8, 2002, at 1A.

<sup>217</sup> James Barron, *A Year Later, Building Hit by Cory Lidle's Plane is Almost Whole*, N.Y. TIMES, Oct. 9, 2007, at B3.

<sup>218</sup> See Maureen Dowd, *Crash at the White House: The Overview; Unimpeded, Intruder Crashes Plane into White House*, N.Y. TIMES, Sep. 13, 1994, at A1.

enhances security while imposing great costs on our taxpayers both in terms of dollars spent and freedom sacrificed. There are simply more elegant and cost-effective solutions than the “do something” approach to security that currently pervades the general aviation community. Many solutions were offered among the 21,380 comments the FAA received during its notice-and-comment period when it closed on February 6, 2006.<sup>219</sup> The large number of comments was largely the result of an enormous lobbying campaign by concerned aviation organizations, and speaks to the enormously unpopular nature of this arbitrary airspace rule among aviators and businesses alike.

General aviation accounts for seventy-five percent of all air traffic, provides more than one percent of the United States’ Gross Domestic Product, and supports 1.3 million jobs in professional services and manufacturing.<sup>220</sup> Although both the TSA and the FAA assert that severe restrictions over D.C. offer a great deal of protection, they have crippled the aviation community, forcing many businesses to close and preventing new pilots from entering flight school. Because similar restrictions do not exist for any other city in the U.S., the public outcry has been somewhat muted. Now that the airspace has been made permanent, the DC SFRA and FRZ may be used as a template for other large cities. At that point, it may be difficult to reclaim the freedom of the skies that has so long been an essential part of aviation.

Both the TSA and the FAA gloss over the fact that the general aviation community itself is profoundly concerned about security issues and has taken great measures to ensure no unauthorized personnel are granted access to general aviation aircraft. In December 2002, the AOPA and the TSA jointly launched the Airport Watch Program, establishing a toll-free hotline to express any concerns about suspicious activities.<sup>221</sup> In addition to the hotline, the program provides warning signs, informational literature, and training videos to local airports, and in 2006, the DHS authorized an additional \$275,000 to ensure the program’s continuance.<sup>222</sup>

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<sup>219</sup> See ADIZ Comment Period Closes on Record—AOPA Continues Advocacy With Congress, AOPA ONLINE, Feb. 8, 2006, *available at* <http://www.aopa.org/whatsnew/newsitems/2006/060208adiz.html>.

<sup>220</sup> Our Economy, <http://www.gaservesamerica.com/economy/index.html> (last visited May 24, 2009).

<sup>221</sup> BART ELIAS, SECURING GENERAL AVIATION CRS-22 (2005), *available at* [http://assets.opencrs.com/rpts/RL33194\\_20051215.pdf](http://assets.opencrs.com/rpts/RL33194_20051215.pdf).

<sup>222</sup> *Id.* at CRS-22.

State and local governments, as well as small airports themselves, have likewise contributed to security improvements. Several states now require additional locks on small aircraft, and one state distributed \$1 million in funding to improve lighting, fencing, and gates at small airports.<sup>223</sup> Other state measures include matching funds to airports that receive Aviation Improvement Program grants for security projects and the distribution of security checklists to help assess vulnerabilities and adopt security measures that improve their facilities.<sup>224</sup>

None of these measures will, by themselves, guarantee that a determined rogue pilot will not be able to steal an aircraft. However, given the profound importance of general aviation to our economy, the best solutions lie not in forcing greater restrictions on small aircraft owners and pilots, but in a series of efforts designed to ensure the prosperity of the community rather than to continually tighten an ever-tight strangle hold that has proven so destructive to pilots and businesses alike.

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<sup>223</sup> See *id.* at CRS31-41.

<sup>224</sup> Senate Hearing, *supra* note 82.